

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

TOLL BROTHERS, INC.,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 1314-N
)	
CAROLANN WICKS, Secretary of the)	
Department of Transportation of the State)	
of Delaware, and the DEPARTMENT)	
OF TRANSPORTATION OF THE)	
STATE OF DELAWARE,)	
)	
Defendants.)	

MEMORANDUM OPINION

Date Submitted: June 1, 2006

Date Decided: June 21, 2006

Neal C. Belgam, Elizabeth A. Wilburn and Michele A. Bimson, of BLANK ROME LLP, Wilmington, Delaware; OF COUNSEL: Marc B. Kaplin and Barbara Anisko, of KAPLIN STEWART MELOFF REITER & STEIN, P.C., Blue Bell, Pennsylvania, Attorneys for Plaintiff.

Collins J. Seitz, Jr. and Max B. Walton, of CONNOLLY BOVE LODGE & HUTZ LLP, Wilmington, Delaware, Attorneys for Defendants.

CHANDLER, Chancellor

This case involves plaintiff Toll Brothers Inc.’s (“Toll Brothers”) claim that the Delaware Department of Transportation (“DelDOT”) and its former Secretary (Nathan Hayward¹) have unlawfully interfered with Toll Brothers’ land application to develop a 162-acre property located in New Castle County, Delaware. Under Toll Brothers’ plan, the property in question (commonly known as the Delaware National/Hercules golf course) will be subdivided into 160 single-family homes.² Toll Brothers insists that DelDOT, and in particular former-Secretary Hayward, has taken actions specifically to prevent the development of the property so that DelDOT can acquire the property at a reduced purchase price.

Toll Brothers alleges that DelDOT and Hayward have withheld approvals, imposed unreasonable conditions upon Toll Brothers regarding traffic aspects of the proposed development and have improperly attempted to influence New Castle County to deny approval of the proposed development. As relief, Toll Brothers seeks a declaration that DelDOT and Hayward’s actions violate state statutes or

¹ Nathan Hayward resigned as Secretary of DelDOT (effective February 2006) and his successor, Carolann Wicks, has been appointed and confirmed. In accordance with Court of Chancery Rule 25(d), Secretary Wicks is “automatically substituted as a party” in the proceedings. Although Secretary Wicks is substituted as a party by operation of Rule 25(d), references in this decision are to Secretary Hayward in order to conform to the allegations in the complaint.

² Compl. ¶ 11.

DelDOT's own regulations and seeks to enjoin the allegedly illegal agency conduct.³

The defendants have moved to dismiss this action on a variety of grounds. I need not address all of the grounds for the defendants' motion to dismiss because I find the complaint fails to state a claim upon which relief can be granted.

I. BACKGROUND FACTS

Plaintiff is a real estate development company headquartered in Horsham, Pennsylvania.⁴ In February 2003, plaintiff entered into an agreement to buy a parcel of land in New Castle County, which it planned to subdivide and develop into a residential community.⁵ On July 1, 2004, the Delaware Legislature passed the Bond and Capital Improvements Act for the Fiscal Year Ending June 30, 2005.⁶ This Act authorized DelDOT to purchase certain properties located in the State of Delaware, including the property at the center of this controversy, in order to "limit future residential, commercial or industrial growth" ⁷ Section 131 specifically authorized the Secretary of DelDOT to "use state funds . . . to purchase land, or such rights in land, as the Secretary deems necessary to protect the

³ Although it is not clear from the complaint, presumably Toll Brothers' injunctive relief would have the Court order DelDOT to issue all the agency approvals deemed necessary to secure favorable action by New Castle County.

⁴ Compl. ¶ 2.

⁵ *Id.* ¶ 9.

⁶ 74 Del. Laws ch. 308.

⁷ Compl. ¶ 9.

following properties . . . [including] c) Delaware National (nee Hercules) Golf Course”⁸

A. The Development Approval Process

Before Toll Brothers can develop the parcel of land, it must obtain approval from the New Castle County Department of Land Use (the “NCCDLU”). The approval process is governed by New Castle County’s Unified Development Code (the “UDC”).⁹ The UDC provides that a developer must submit three plans to the NCCDLU for approval: an exploratory plan, a preliminary plan, and a record plan.¹⁰ In connection with the exploratory plan, the UDC requires that DelDOT be given the chance to provide written comments and suggestions regarding the

⁸ *Id.* Section 131, titled “System Capacity Preservation,” provided in part as follows:
The General Assembly hereby determines that it is in the public interest to limit future residential, commercial, or industrial growth along certain portions of the states highway network. Such potential growth would produce unsafe driving conditions as increased traffic seeks access to, and movements along, a number of local roads and collectors in critical locations throughout the state. The General Assembly further determines that it would be infeasible or imprudent for [DelDOT] to attempt to design and construct modifications to the state’s highway network adjacent to these locations because such improvements would irrevocably destroy the important scenic and historic nature of the view sheds and other environmental attributes associated with these locations. Accordingly, the Secretary of [DelDOT] . . . is authorized and directed to use state funds from those appropriated to the Transportation Enhancements program authorized and funded in the Section 1 Addendum to this Act, together with such other funds from any public or private source as may be available and appropriate, to purchase land, or such rights in land, as the Secretary deems necessary to protect the following properties, pursuant to the stipulations stated herein.

The section then listed six parcels of land throughout the State, including the Delaware National/Hercules Golf Course property, which is the subject of this lawsuit.

⁹ *Id.* ¶ 14.

¹⁰ *Id.* ¶ 15.

potential traffic effects of the plan.¹¹ In connection with the record plan, an appendix of the UDC requires a “letter of approval” from DelDOT.¹²

B. Toll Brothers Files a TIS and Obtains Approval of its Exploratory and Preliminary Plans

In connection with the submission of its exploratory plan to the NCCDLU, Toll Brothers submitted its initial Traffic Impact Study (“TIS”) to DelDOT for review and comment in May 2003. As might be expected, the creation of 160 new single-family homes will significantly increase the number of cars on the surrounding roads. To ameliorate the effects of this increase in traffic, Toll Brothers’ TIS proposed the construction of improvements to the surrounding roads.

In a letter dated April 16, 2004, DelDOT responded by expressing the opinion that these improvements would be sufficient and that they “may be buildable,” but noting that “[m]ore detailed engineering . . . will be needed to verify that [the improvements] can be built within the available rights-of-way.”¹³

In particular, the letter stated:

Should the County choose to approve this development, the following items should be incorporated into the site design and reflected on the record plan:

¹¹ *Id.* ¶ 33.

¹² UDC App. 1.

¹³ Compl. ¶ 33.

1. Prior to record plan approval, the developer should be required to develop plans for the intersection of Route 41 and Hercules Road/Mill Creek Road in a manner acceptable to DelDOT. The plans should be of sufficient detail for DelDOT to determine whether the improvements can be built within the existing right-of-way. If the improvements involve the bridge by which Hercules Road crosses Hyde Run, the plans should be of sufficient detail for all relevant environmental agencies to determine what permits are required.

The plans should include the conversion of the northbound and southbound Route 41 and eastbound Hercules Road right-turn lanes to shared through and right-turn lanes, thereby creating a separate left-turn lane, a through lane and a shared through and right-turn lane for each of these approaches. This conversion should include the widening of those lanes and the construction of new shoulders, with the specific typical section and limits of construction to be at DelDOT's discretion. The plans should include widening of the approaches and departures for the two through lanes and the tapers back to one travel lane.

Record plan approval should be predicated on DelDOT's determination that the plans are adequate in scope and the developer's ability to obtain the rights-of-way and permits necessary to build the improvements.¹⁴

DelDOT did not approve the TIS.¹⁵ Nonetheless, having received DelDOT's comments on the TIS, Toll Brothers submitted its exploratory plan to the

¹⁴ Mar. 6, 2006 DelDOT Let. to C. Chandler, Ex. C (Apr. 16, 2004 DelDOT Let. from Brockenbrogh to Baker, at 1-2).

¹⁵ DelDOT granted "conditional" approval: It would approve the TIS if Toll Brothers could later demonstrate that the improvements were capable of being built within the existing rights-of-way.

NCCDLU, and the NCCDLU approved the exploratory plan on June 22, 2004. On September 15, 2004, Toll Brothers submitted a preliminary plan to the NCCDLU.

C. Toll Brothers' Repeated Attempts to Obtain Approval from DelDOT

Since the acceptance of its exploratory plan, Toll Brothers has submitted five additional survey plans to DelDOT attempting to demonstrate that the improvements can be built within the existing rights-of-way. Toll Brothers filed its first set of plans with DelDOT on March 21, 2005. On May 3, 2005, Toll Brothers filed its complaint in this Court seeking injunctive and declaratory relief.

Since filing the complaint, Toll Brothers has submitted additional survey plans to DelDOT on four separate occasions: September 8, 2005; October 24, 2005; December 6, 2005; and March 2, 2006. With respect to each of the successive submissions to DelDOT, DelDOT has reviewed the plans and notified Toll Brothers of the specific reasons why the plans fail to demonstrate that the proposed improvements can be built within the existing rights-of-way.

D. The NCCDLU Approves Toll Brothers' Preliminary Plan

On January 10, 2006, the NCCDLU accepted Toll Brothers' preliminary plan. The plan was accepted even though DelDOT never approved the accompanying TIS. After approval of its preliminary plan, Toll Brothers proceeded to the next stage in the approval process: the filing of a record plan.¹⁶

¹⁶ Jan. 19, 2006 Toll Bros. Let. To C. Chandler, at 1.

E. Toll Brothers' March 2 Submission

Toll Brothers filed its latest concept plan submission with DelDOT on March 2, 2006. Since Toll Brothers had already received approval of its preliminary plan, these submissions could only have been for the purpose of obtaining a “letter of approval” from DelDOT.

In the March 2 submission, Toll Brothers states that the proposed improvements can be built *if*: (1) a right of entry is obtained for lands adjacent to the roadway; (2) an additional right-of-way is acquired; and (3) certain DelDOT road design standards are waived.

1. Toll Brothers Concedes It Cannot Build the Proposed Road Shoulders Within the Applicable Right-of-Way

In its March 2, 2006 submission, Toll Brothers concedes that, in order to construct road shoulders of the requisite width, it must obtain “the right to temporarily enter the adjacent property to re-grade an area of approximately 11.5 feet in width by approximately 300 feet in length along the northbound leg of the intersection to grade properly the proposed improvements.”¹⁷ In other words, Toll Brothers admits that it must grade “outside” one of the existing rights-of-way, thus conceding that the proposed improvements cannot be built *within* the right-of-way.

¹⁷ Mar. 6, 2006 DelDOT Let. to C. Chandler, Ex. A (Mar. 2, 2006 Kaplin Stewart Let. from Kaplin to Boyce, at 2).

Toll Brothers alleges that the area to be graded is owned by the State of Delaware and that DelDOT should be able to obtain the right to enter.¹⁸

2. Toll Brothers Concedes that the Proposed Grading Cannot Be Built Within the Applicable Right-of-Way

In its March 2, 2006 submission, Toll Brothers also states that a “guide rail can be placed within the legal right-of-way,” but that this is only possible if the grading behind the guide rail is at an 8:1 slope, rather than the mandated 15:1 slope.¹⁹ Toll Brothers effectively seeks a waiver of DelDOT’s road design standards with respect to the slope of the grading. Without this waiver, the proposed improvement cannot be built within the existing right-of-way.

3. Toll Brothers Concedes the Bridge Improvement Cannot Be Built Within the Applicable Right-of-Way

Finally, in its March 2, 2006 submission, Toll Brothers requests a waiver with respect to the widening of the Hyde Run Bridge. In each of the review letters provided to Toll Brothers by DelDOT, DelDOT has required Toll Brothers to show that an eight-foot shoulder can be constructed within the existing right-of-way. Toll Brothers’ March 2 letter states that the “eight foot shoulders in this area cannot be accomplished without the widening of the bridge and the acquisition of a

¹⁸ *Id.* (“The adjacent property, over which the grading would take place, is owned by the State of Delaware and we believe that DelDOT should be able to obtain such right to enter.”)

¹⁹ *Id.*

[new] right-of-way to the east of the bridge.”²⁰ Toll Brothers’ latest submission concedes that the required improvement of the Hyde Run Bridge cannot be built within the *existing* rights-of-way.

F. DelDOT’s Rejection of the March 2 Submission

Toll Brothers’ four previous submissions to DelDOT were unacceptable on the grounds that they failed to show how the proposed improvements could be built within the existing rights-of-way. Thus, it is doubtful Toll Brothers could have credibly expected DelDOT would be persuaded by the March 2 submission, which concedes that construction of the improvements is impossible within the existing rights-of-way. As anyone familiar with the facts of this case would have expected, DelDOT expressed opposition to the March 2 submission by letter dated May 26, 2006.

G. Toll Brothers’ Record Plan

Toll Brothers now seeks to file a record plan with the NCCDLU. Before it submits its record plan for review by the NCCDLU, Toll Brothers seeks a “letter of approval” from DelDOT. According to Toll Brothers, this “letter of approval” is a predicate to filing any record plan submission with the NCCDLU.

²⁰ *Id.* at 4.

II. ANALYSIS

By its letter dated May 26, 2006, DelDOT refused to waive its design requirements and approve the March 2 plans. This was because the plans showed that the improvements could not be constructed within the existing rights-of-way. As a result, Toll Brothers contends that DelDOT has issued a final decision that was arbitrary and capricious. Toll Brothers asserts that it is without administrative remedy and that this Court must intervene. I disagree, and conclude that Toll Brothers' complaint fails to state a claim upon which relief can be granted.

Toll Brothers' claim fails for four reasons. First, it does not allege facts supporting the contention that a final decision has been rendered by DelDOT, either with regard to the TIS or the letter of approval. Second, the complaint does not allege any facts supporting the contention that DelDOT's actions regarding Toll Brothers were arbitrary or capricious. Third, the matter as plead is not ripe. Fourth, Toll Brothers has failed to exhaust its administrative remedies.

A. DelDOT Did Not Issue a Final Decision with Regard to the TIS

Toll Brothers alleges in its complaint and argues in its brief that DelDOT's refusal to approve the TIS was a de facto final decision because Toll Brothers could not proceed with preliminary and record plan approval without acceptance of the TIS.²¹ Toll Brothers' complaint and brief asserted that unless DelDOT

²¹ Compl. ¶ 56.

approved the TIS, the NCCDLU would never approve its preliminary plan.²² Toll Brothers now concedes that on January 10, 2006, the NCCDLU *did approve* the preliminary plan, even though DelDOT never approved its TIS. Thus, this issue appears to be moot.

Even assuming that the issue is not moot, it is clear as matter of law that, under the UDC, DelDOT's role in the TIS approval process is advisory. Section 40.11.150 of the UDC makes clear that DelDOT merely offers recommendations and comments to the ultimate decision-maker, i.e., New Castle County. Section 40.11.150A states that upon receipt of a TIS with comments from DelDOT, *the NCCDLU shall review the TIS* with regard to six factors:

1. The accuracy, completeness, and thoroughness of the traffic impact study as well as whether the study was conducted in conformance to the study parameters set by the [NCCDLU].
2. *DelDOT's comments and recommendations* when DelDOT reviewed the traffic impact study.
3. The level of service requirements of this Article.
4. Appropriateness and adequacy of any proposed mitigation measures.
5. Compatibility with regional and State transportation plans and nearby development proposals.

²² *Id.* ¶¶ 29, 35.

6. Design principles and standards as described in this Chapter (*e.g.*, inter-connectivity, transit/pedestrian accessibility and street design.)²³

Section 40.11.150B then states that:

Based upon the above criteria [listed in section 41.11.150A], *the [NCCDLU] shall approve, approve with conditions or disapprove the TIS.* The [NCCDLU] shall approve the project when the TIS demonstrates that acceptable levels of service will be maintained for roadway segments and intersections within the area of influence of the project as defined by Section 40.11.120. The project shall not be approved if it will result in an unacceptable level of service for a [sic] roadway segments or intersection(s) within the area of influence of the project. If the study is not approved the applicant may take one (1) of the following actions:

1. The applicant may request permission to revise the proposed plan and TIS to include additional traffic mitigation measures necessary to maintain acceptable levels of service within the project's area of influence. The proposed revisions shall be submitted by the applicant to the [NCCDLU] and DelDOT.
2. The applicant may submit for approval an exploratory plan with a lower maximum intensity and density that does not exceed adequate levels of service, or submit for review and record (with approval) a declaration of restrictions that would prohibit development until such time as an adequate level of service can be achieved.²⁴

Thus, the UDC provides that DelDOT's TIS recommendations are merely advisory. They are not binding and DelDOT's recommendations do not constitute

²³ UDC § 40.11.150A (emphasis added).

²⁴ UDC § 40.11.150B (emphasis added).

a final decision. This is in accord with Delaware law,²⁵ legal precedent of this Court²⁶ and the New Castle County Municipal Code.²⁷

B. DelDOT's Refusal to Issue a "Letter of Approval" Is Not a Final Decision

Toll Brothers argues that DelDOT's refusal to grant a "letter of approval" is a final decision. A letter of approval is not listed as a requirement in the main body of the UDC. Looking at Article 31 of the UDC in particular, there is no mention of a letter of approval as a requirement before a record plan can be submitted to the NCCDLU.²⁸ Toll Brothers points to section 40.31.114 of the UDC, which states: "The applicant shall submit a record plan pursuant to the requirements in Appendix 1."²⁹ Appendix 1 in turn lists the requirements for a complete record plan submission, including a "[l]etter of approval from DelDOT regarding transportation matters."³⁰

On January 10, 2006, the NCCDLU sent Toll Brothers a letter approving its preliminary plan. This letter also states that the NCCDLU will not consider a

²⁵ 29 Del. C. § 9206.

²⁶ See *Citizens Coal., Inc. v. Sussex County Council*, 2004 WL 1043726, at *2 (Del. Ch. Apr. 30, 2004); *Deskis v. County Council of Sussex County*, 2001 WL 1641338, at *9 (Del. Ch. Dec. 7, 2001).

²⁷ New Castle County Mun. Code § 28.01.003.

²⁸ Under previously enacted versions of the New Castle County Code, there was in fact such a requirement. See *Acierno v. New Castle County*, 2004 WL 745715, at *1 (Del. Super. Apr. 7, 2004) ("Pursuant to the New Castle County Code *at the time this action was instituted*, section 32-97(d)(5), submission of a record plan shall include a letter of approval from DelDOT concerning provisions of streets, curb cuts and other pertinent matters.") (emphasis added).

²⁹ UDC § 40.31.114.

³⁰ UDC App. 1.

record plan submission without a letter of approval from DelDOT.³¹ The letter states:

This [preliminary] plan meets the concurrency requirements of Article 11 of the UDC. The NCCDLU agrees with DelDOT's April 16, 2004 TIS report (copy attached) stating that acceptable Levels of Service can be achieved with identified off-site improvements to the intersection of Hercules Road and Newport-Gap Pike. Note this restriction on the Record Plan. To reiterate previous review comments, the UDC requires that prior to Record Plan approval, a *letter of approval must be submitted* from DelDOT regarding transportation matters. In the course of acquiring this letter, you may need to address *other comments and recommendations* from DelDOT.³²

Granting all inferences in Toll Brothers' favor, I conclude that this letter arguably states the NCCDLU's opinion that a letter of approval is required before the NCCDLU will consider a record plan submission.³³

DelDOT's role within the UDC development process is clearly limited to that of an advisor. Section 28.01.004 of New Castle County's Municipal Code, entitled "Comprehensive development code," states:

The County Council does hereby adopt the following regarding the joint highway division/County policy on phasing land development with highway capacity:

A. County Council will continue to make the *final decisions* on rezoning and record plans.³⁴

³¹ Nov. 2, 2005 Toll Bros.' Let. to C. Chandler, Ex. 5 (Dec. 13, 2004 Let. from Bennett to Toll Bros., at 1).

³² *Id.* (emphasis added).

³³ This letter is not, however, a final decision from the NCCDLU regarding whether a letter of approval is required.

³⁴ New Castle County Mun. Code § 28.01.004 (emphasis added).

In addition, section 9206 of Title 29 of the Delaware Code specifically states:

Nothing in this subchapter shall be construed to deny local jurisdictions their final decision-making authority over proposed local land use planning actions.³⁵

Finally, this Court has stated on at least two previous occasions that DelDOT's role is limited because county authorities hold final, decision-making authority over local land use decisions.³⁶

Based on the above, I conclude that the County's interpretation of the UDC described in the letter to DelDOT is, in all likelihood, contrary to the law. The fact that *County officials* are mistaken about the letter of the law, however, does not create a right of action *against DelDOT*.

C. Toll Brothers Should Submit its Record Plan to the NCCDLU for a Final Decision

Contrary to its repeated assertions, Toll Brothers does not find itself “dead in the water” without any administrative remedies. At this stage of the development approval process, Toll Brothers may choose from among several available options.

Pursuant to § 40.11.150B, Toll Brothers may revise its development plan or revise its intersection improvement plan. It may also seek a level of service waiver

³⁵ 29 Del. C. § 9206.

³⁶ See *Citizens Coal., Inc. v. Sussex County Council*, 2004 WL 1043726, at *2 (Del. Ch. Apr. 30, 2004); *Deskis v. County Council of Sussex County*, 2001 WL 1641338, at *9 (Del. Ch. Dec. 7, 2001).

or a subdivision variance from the NCCDLU. Finally, Toll Brothers may submit its current record plan (without a letter of approval) to the NCCDLU and, in the event the NCCDLU rejects the plan, appeal that decision through the prescribed administrative channels.

With respect to this final option, these prescribed administrative channels are obvious and available. Toll Brothers simply has to bring its latest plan before the NCCDLU, complete with the numerous DelDOT responses to the plans. If Toll Brothers disagrees with DelDOT's conclusions regarding the traffic engineering issues, then it may argue to the NCCDLU that DelDOT's conclusions are incorrect. If the NCCDLU agrees with DelDOT's conclusions, then Toll Brothers can immediately appeal the NCCDLU's decision. If the NCCDLU refuses even to consider the record plan without a letter of approval from DelDOT, Toll Brothers can appeal that decision.³⁷

As Toll Brothers acknowledges,³⁸ the UDC provides for appeal from decisions made by County administrative bodies and boards. Section 40.31.500 of the UDC entitled "Appeals and Interpretations" expressly states that: "This Division contains rules and standards for an appeal of a decision made by a County administrative board or body."³⁹ The NCCDLU qualifies as a county

³⁷ See *Christiana Town Center*, 2003 WL 21314499, at *4.

³⁸ Dec. 22, 2005 Toll Bros.' Let. to C. Chandler, at 3.

³⁹ UDC § 31.500.

administrative board or body.⁴⁰ Thus, if Toll Brothers obtains a final decision from the NCCDLU that is adverse, it will have a right to appeal that decision.⁴¹

In the event that Toll Brothers submits its record plan to the NCCDLU and subsequent appeals are unsuccessful, it will have the right to seek a writ of mandamus⁴² or certiorari⁴³ in a court of law.⁴⁴

D. Toll Brothers Does Not Allege Any Arbitrary or Capricious Action by DelDOT

Even if I assume that Toll Brothers' complaint states a claim (which it does not), nothing in Toll Brothers' complaint, or its subsequent submissions, alleges arbitrary and capricious actions by DelDOT. DelDOT has applied reasonable standards in a fair and rational manner. DelDOT has consistently rejected Toll Brothers' plans because they fail to show how the proposed improvements can be built within the existing rights-of-way.

Toll Brothers argues, without citing *any* authority, that DelDOT should be required to vary its road design standards simply so Toll Brothers can attempt to

⁴⁰ *Christiana Town Center*, 2003 WL 21314499, at *4.

⁴¹ *Id.*

⁴² *See Acierno*, 2004 WL 745715, at *2 (Writ of Mandamus is an available remedy for challenging a NCCDLU land use decision).

⁴³ *See Dover Historical Soc. v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1106 (Del. 2003) ("It is well established that a writ of certiorari proceeding in the Superior Court is the appropriate cause of action for determining whether, on the face of the record, the City of Dover Planning Commission [a municipal entity vested with the authority to approve construction projects] exceeded its powers or failed to conform to the requirements of law.")

⁴⁴ In order to pursue a claim in the Delaware Superior Court, Toll Brothers will likely be required to join New Castle County as a defendant. Furthermore, because it appears to be only the equitable owner of the parcel of land at the center of this dispute, Toll Brothers should be prepared to bring suit together with the legal owner of the property.

obtain approval from the NCCDLU to build the proposed 160-unit housing development. This argument is frivolous. In the same frivolous vein, Toll Brothers asserts that, since the State allegedly owns the adjoining land, DelDOT is obligated to obtain a right-of-entry for Toll Brothers. As DelDOT correctly notes, even assuming that the State owns the adjoining land, no statute or regulation requires DelDOT or the State of Delaware to grant a private entity a right-of-way on adjoining property. None of Toll Brothers' contentions come close to alleging arbitrary and capricious agency action.

E. Toll Brothers' Claim Is Not Ripe

Even assuming the complaint somehow stated a claim, Toll Brothers' complaint fails for another reason: the claim is not ripe. The controversy at the center of this case has "not yet matured to a point where judicial action is appropriate."⁴⁵ A claim is ripe for adjudication if the facts underlying the claim are established and are not subject to change.⁴⁶ As described above, Toll Brothers has not yet obtained a final decision on its development plans and it currently may be pursuing any of the several administrative remedies available to it. Depending on which of these remedies Toll Brothers ultimately chooses, the facts underlying

⁴⁵ *Stroud v. Milliken Enter., Inc.*, 552 A.2d 476, 480 (Del. 1989) (citing *Schick Inc. v. Amalgamated Clothing and Textile Workers Union*, 533 A.2d 1235, 1239 (Del. Ch. 1987)).

⁴⁶ *Arlo Assoc. v. Hayward*, 2003 WL 22594526, at *5 (Del. Ch. Oct. 31, 2003).

Toll Brothers' claim will assume a "concrete and final form"⁴⁷ at some time in the future.

After Toll Brothers filed its complaint in May 2005, it has continued to file subsequent plans with DelDOT and with the NCCDLU. As a result, this case has taken on the character and feel of a "moving-target." Indeed, the underlying facts have changed so frequently that the parties have filed fifteen post-briefing letters designed to keep this Court informed of the current status of the subdivision approval process. As described above, Toll Brothers has not obtained (nor even sought) a final decision on its plans from the NCCDLU. Until Toll Brothers obtains a final and determinative decision, its claims will not be ripe for adjudication because the underlying facts will not be "concrete and final."

F. Toll Brothers Has Failed to Exhaust Its Administrative Remedies

Delaware courts employ a strong presumption favoring the exhaustion of administrative remedies.⁴⁸ Plaintiff bears the burden of overcoming this presumption.⁴⁹ The presumption can be overcome by showing that: (1) administrative review would be futile; (2) there is a need for a prompt decision in the public interest; (3) the issues do not involve administrative expertise or

⁴⁷ *Stroud*, 552 A.2d at 480.

⁴⁸ *Levinson v. Delaware Comp. Rating Bureau, Inc.*, 616 A.2d 1182, 1190 (Del. 1992).

⁴⁹ *Id.*

discretion; or (4) irreparable harm would result from denial of immediate judicial relief.⁵⁰ None of these exceptions applies in this case.

Application of the doctrine of exhaustion of administrative remedies is a matter of judicial discretion.⁵¹ The doctrine exists and is applied “[i]n order to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts.”⁵² Applying the four exceptions to the facts of this case, Toll Brothers fails to overcome the presumption. First, administrative review would not be futile because it is possible the NCCDLU would approve Toll Brothers’ record plan submission (just as it did with Toll Brothers’ preliminary plan submission). Second, the public interest does not require a prompt decision. Third, the issues, which center on technical engineering concepts, obviously involve administrative expertise. Fourth, irreparable harm will not result from the denial of immediate judicial relief because of the appeals mechanisms built into the UDC and Toll Brothers’ right to seek mandamus or certiorari in a court of law.

III. CONCLUSION

Toll Brothers has brought this suit against DelDOT but has alleged facts showing that DelDOT has actually applied its standards in a reasonable way. Toll

⁵⁰ *Id.*

⁵¹ *Levinson*, 616 A.2 at 1189.

⁵² *Id.* at 1190.

Brothers' only plausible contention is that New Castle County officials have advised it that they plan to misapply the applicable law so that they can refuse to even consider Toll Brothers' record plan submission. If the County does in fact issue a final decision to that effect, that decision is arguably contrary to the law. That hypothetical case will (perhaps) ripen some time in the future, and the proper defendant in such a case will be New Castle County. At this stage of the land development process, Toll Brothers does not have a claim against DelDOT.

An Order will be entered in accordance with this Memorandum Opinion.